

**In the District Court of the United States
for the Southern District of New York**

Civil No. 21-271

**PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK, ET AL., PLAINTIFFS-APPELLANTS**

v.

**UNITED STATES OF AMERICA, ET AL., DEFENDANTS-
APPELLEES**

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree of a specially constituted district court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The decree, together with written opinion, was entered on June 10, 1943. An appeal was allowed on June 11, and the appellees were served with the appeal papers on June 15. On June 17 appellants presented before Mr. Justice Jackson their petition for a stay pending appeal. Appellees appeared in opposition.

Mr. Justice Jackson stated that he would not grant the stay at this time, but that appellees might file a motion to affirm directly with this Court at once, in order that the full Court might pass upon the Court's jurisdiction and the consequent need for a stay at this Term.

The order of the Commission, Division 4, dated March 20, 1943, granted appellee New York Central Railroad a certificate of public convenience and necessity, under Section 1 (18)-(22) of the Interstate Commerce Act (49 U. S. C. sec. 1 (18)-(22)), to abandon its so-called Yonkers branch.¹ A petition for rehearing was denied by the entire Commission on May 10, 1943. The order was attacked in the District Court by the New York Public Service Commission, the City of Yonkers, New York, and a committee of Yonkers commuters. Only the latter two have so far appealed from the decree below.

The pertinent facts, as they appear from the decision of the Commission and that of the District Court, are as follows: The Yonkers branch is an electrified, exclusively passenger line owned and operated directly by the New York Central Railroad. It extends for a distance of 3.1 miles from Getty Square in Yonkers, New York, to a

¹ This order will now become effective on June 19, 1943, but the New York Central Railroad agreed before Mr. Justice Jackson to continue operations through June 1943 without a stay, in order that the Court might pass upon the case at this Term.

junction with the Putnam Division of the New York Central at Van Cortlandt Park Junction. Service is rendered over the line by two- to four-car trains which run from Getty Square to the connection with the Putnam Division at Van Cortlandt Park Junction, thence down that division through station stops known as University Heights and High Bridge, to the terminus of the Putnam Division at Sedgwick Avenue. The total length of these operations is 7.8 miles. The Commission's order will permit the abandonment of these through operations for the 7.8-mile distance and actual physical abandonment of the line for the 3.1-mile distance to Van Cortlandt Park Junction.

The New York Central has two other lines passing through Yonkers and into New York City, which parallel the Yonkers branch. To the west is the main line to Chicago, known as the Hudson Division, also electrified, which extends into Grand Central Station. To the east is the aforementioned Putnam Division, with which the Yonkers branch physically connects, and which, except for the portion south of Van Cortlandt Park Junction, is steam-operated. On each of these two lines and on the Yonkers branch there are four or five station stops in Yonkers. The stops on the Yonkers branch are situated from .3 to .9 of a mile's distance from the nearest station on one of the other branches.

In the past, while there has been some local passenger traffic on the Yonkers branch, most of the passengers have been commuters between Yonkers and Grand Central Station, and there is nothing in the Commission's report to show that interstate passengers are carried by this branch. These commuters, for the most part, transferred from the Yonkers branch to trains on the Hudson Division at either High Bridge or University Heights to continue into Grand Central Station. A smaller number used the Yonkers branch trains to Sedgwick Avenue. From there, prior to the recent abandonment of the Sixth and Ninth Avenue Elevated Railways, passengers had direct service via these elevated lines to downtown New York. Since these abandonments, however, passengers at Sedgwick Avenue must use the shuttle to 155th Street and then take the Eighth Avenue subway to downtown New York.

The Commission found that there had been a steady dropping off of business on the Yonkers branch until it was only 25 percent of that 12 years ago. It pointed out that improved alternative methods of transportation between Yonkers and New York, and the abandonment of the Sixth and Ninth Avenue Elevated, had contributed to this loss of patronage. It was found that while the commuter traffic on other divisions of the New York Central had increased nearly 12 percent during the past year, the commuter traffic on the Yonkers branch had increased only 2.87 percent.

and that nothing pointed to any substantial future increase. Weighing the average income derived from this branch in 1940 and 1941 against the expenses of operation, the Commission found that the estimated annual loss to the carrier from this operation was \$56,941. In reaching the income figures employed, the Commission credited the line with all revenue earned from local passengers, as well as with all revenue earned by the system on passengers originated by the line and continuing on to downtown New York on other branches. The Commission found that there were alternative, though somewhat less convenient, methods of transportation to downtown New York for commuters now relying on the Yonkers branch. Thus, they could take a bus to stations on the Hudson Division and then the Hudson Division trains downtown. Or they could take a Broadway trolley to various subways and the subways downtown. The president of the local bus company testified that his company would put on two additional buses which he believed would accommodate any additional bus passengers resulting from an abandonment of the line. It was found that the traffic on the trolley line was light and that substantially more passengers could be accommodated by it without difficulty. The Commission concluded that the line was being operated at a substantial loss; that there was no prospect of more favorable results for the future; that continued operation would impose an undue bur-

den upon interstate commerce and the New York Central Railroad; and that the present and future public convenience and necessity would permit the abandonment of the Yonkers branch.

Appellants made a twofold attack upon this order in the District Court. First, it was asserted that for several reasons the Commission lacked jurisdiction to permit this abandonment and that its action interfered with the jurisdiction of the New York Public Service Commission over intrastate operations. Secondly, it was said that the full Commission abused its discretion and denied appellants a fair hearing by refusing to grant their petition for rehearing to enable them to introduce certain newly discovered evidence as to changed circumstances alleged to be material. It is submitted that these contentions present no substantial question of law and that the decree of the District Court should therefore be affirmed without argument.

1. Appellants contended, first, that the Yonkers branch was removed from the Commission's abandonment jurisdiction by the language of Section 1 (22) of the Interstate Commerce Act (49 U. S. C. sec. 1 (22)) exempting from the control of the Commission "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." That this argument is merely an afterthought is demonstrated by the fact that

it was only raised before the Commission in the petition for rehearing. For that reason, the Commission's report contains no discussion of this point. Appellees, nevertheless, admitted before the lower court that this contention raised a jurisdictional issue of fact which the statutory court was permitted to decide on evidence *de novo*, under the doctrine enunciated by this Court in *United States v. Idaho*, 298 U. S. 105. The court below examined the question and found that there was no doubt that this line was operated as part of the New York Central system and that the Commission accordingly had jurisdiction. The court made detailed supporting findings in this connection, stating in part:

The use of part of the Putnam tracks, the transfers given to other parts of the line, the general repair and maintenance of the branch, and other details of operation—all appear intertwined with the operation of the system as a whole.

The fact that ownership, management, operation, and control of the Yonkers branch are all vested in the New York Central clearly demonstrates the correctness of the court's conclusion that it is operated as part of that steam railroad system. The Commission has consistently recognized that the existence of steam railroad ownership, management, and control, through stock ownership or otherwise, is the principal criterion to be con-

sidered in determining whether an electric line is operated as part of a steam railroad system within the meaning of this and comparable exemptions. *Unified Operation at Los Angeles Harbor*, 150 I. C. C. 649, 661; *Hudson & Manhattan R. Co.*, 216 I. C. C. 745, 752; *Pittsburgh L. & W. R. Co. Practices*, 227 I. C. C. 73, 101; *Interurban Electric Ry. Co.*, 227 I. C. C. 589; *New York, Westchester & Boston Ry. Co.*, 218 I. C. C. 253.²

The determination of the District Court, like that of the Commission under comparable circumstances, is a factual one, not to be disturbed on appeal, where, as here, there is any substantial evidence and a rational basis to support it. *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177. As a consequence, it is unnecessary to consider whether this line is more than a "street, suburban, or interurban electric railway" and hence, for a further reason, not within the exemption of Section 1 (22) of the Act, but it plainly is such. *Hudson & Manhattan R. Co. v. Hardy*, 103 F. (2d) 327 (C. C. A. 2), certiorari denied, 307 U. S. 640; *Sprague v. Woll*, 122 F. (2d) 128 (C. C. A. 7), certiorari denied, 314 U. S. 669; cf. *United States v. Chicago, North Shore & Milwaukee R. Co.*, 288 U. S. 1.

² The Commission held in the *Interurban Electric* and *Westchester* cases, *supra*, on much less convincing facts than exist here, that the electric lines involved were parts of a steam railroad system. There the electric lines were separate corporations, but their stock to a large extent was owned or controlled by a steam railroad.

Secondly, appellants stated that the Commission had no jurisdiction because the Yonkers branch is located wholly in New York State and carries only intrastate passengers. It was further suggested that the Commission's order illegally interfered with the jurisdiction of the New York Public Service Commission, whose consent it is said is required by statute for the discontinuance of stations in intrastate operation. But the language of the Interstate Commerce Act makes it clear that the Commission had jurisdiction and that the New York Public Service Commission must bow to the dictates of the federal agency. Thus Section 1 (18) (49 U. S. C. sec. 1 (18)) requires a carrier subject to the Interstate Commerce Act to secure the Commission's approval before abandoning any portion of its line. Obviously the New York Central is an interstate carrier subject to the Commission's jurisdiction, and the Yonkers branch is a portion of its line. Furthermore, Section 1 (20) (49 U. S. C. sec. 1 (20)) provides that when a carrier has secured a certificate from the Commission, it may abandon "without securing any approval other than the certificate." This indicates that Congress intended to make the jurisdiction of the Commission exclusive. In any event, this Court has settled the question by holding that the Commission has jurisdiction to authorize the abandonment of intrastate operations on a branch located entirely in a single State, when they are carried on by an

interstate carrier, and when the operations are found to burden interstate commerce. *Colorado v. United States*, 271 U. S. 153; *Transit Commission v. United States*, 284 U. S. 360; cf. *Texas v. Eastern Texas Ry.*, 258 U. S. 204.

It is said that because the New York Central's operations, taken as a whole, are profitable, the unprofitable operations on the Yonkers branch could not as a matter of law result in burdening interstate commerce and, for this third reason, the Commission was without jurisdiction. However, both the Commission and the courts have consistently recognized that such a financial condition does not prevent the authorization of abandonment of unprofitable operations. *E. g.*, *Transit Commission v. United States*, 284 U. S. 360, 370; *Purcell v. United States*, 41 F. Supp. 300, 313 (Md.); affirmed, 315 U. S. 381; *Town of Inlet v. New York Central R. Co.*, 7 F. Supp. 781 (N. D. N. Y.). The function of the Commission in a case of this type is to weigh the disadvantages to a local community and intrastate commerce from an abandonment against the burden which continued operation will throw upon interstate commerce. *Colorado v. United States*, 271 U. S. 153, 168. Here it has done just that and concluded that the benefit to the New York Central Railroad outweighs the resulting injury to Yonkers commuters. The ultimate issue of public convenience and necessity is a factual one; and

where, as here, there is a rational basis and substantial evidence to support the Commission's conclusion, its decision must be affirmed. *Purcell v. United States*, 41 F. Supp. 309, 314 (Md.), affirmed, 315 U. S. 381; *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer and Storage Co. v. United States*, 42 F. Supp. 215 (E. D. Pa.), affirmed, 317 U. S. 587.

2. As to the contention that appellants were denied a fair hearing because their petition for rehearing was denied, the District Court's decision disposes of the issue so well that we merely repeat here what it said:

Denial of a rehearing was clearly within the Commission's discretion, 49 U. S. C. A. sec. 17 (6); the claimed additional evidence was not of the kind to persuade to a different conclusion. The evidence was claimed to show that a New York subway would be extended to the terminus of the Yonkers Branch, that Yonkers and New York could or would reduce tax assessments, and that the present crisis in gasoline would reduce bus transportation. But the City of New York, which favored abandonment, showed that building of the subway extension was at best a matter for the quite indefinite future and there was no hope of tax abatement there; and if prospects of lessened taxes in Yonkers were brighter, at most the

reduction would be less than \$9,000 per year. And there were alternative methods of transportation not dependent upon bus service. The suggestion that this loss may be used to reduce Central's excess-profits tax suggests interesting possibilities for keeping declining roads alive; it may, however, be safely left with the Commission. The Commission had already allowed plaintiffs a full hearing, although not required by law to do so. *Woodruff v. United States*, D. C. Conn., 40 F. Supp. 949; 49 U. S. C. A. secs. 1 (1) (a), 20a (6). Its denial of a further hearing cannot, therefore, be attacked here. * * *

For the foregoing reasons, it is submitted that the decree of the District Court should be affirmed.

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